88-195

No. ....

In The

Supreme Court of the United States

October Term, 1988

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DENZIL G. KREISHER,

Petitioner,

vs.

MOBIL OIL CORPORATION,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

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QUESTION PRESENTED

Do the trial courts of the states enjoy concurrent jurisdiction to enforce the provisions of the Petroleum Marketing Practices Act, 15 United States Code §§ 2801-2806, or does the language of the Act permitting suit in Federal District Court "regardless of the amount in controversy" indicate congressional intent to confer exclusive jurisdiction in the federal courts in the face of language in the Act which assumes concurrent state court jurisdiction?

PARTIES TO THE PROCEEDING BELOW

Petitioner DENZIL KREISHER is the sole remaining Plaintiff, his former co-Plaintiff, DOROTHY KREISHER, his spouse, having settled with Defendants.

In addition to MOBIL OIL CORPORATION, Defendants below included JAMES EDWARDS, JOSEPH WRIGHT, and KEVIN RILEY, all of whom were MOBIL employees. Judgment in the trial court was entered against both MOBIL OIL CORPORATION and JAMES EDWARDS; the jury was unable to reach a verdict as to the liability of Defendants JOSEPH WRIGHT and KEVIN RILEY.

As to the Petroleum Marketing Practices Act, however, only Petitioner DENZIL KREISHER met the definition of "franchisee," and only Respondent MOBIL OIL CORPORATION met the definition of "franchisor," and they are accordingly the exclusive parties to the issue presented to this Court.

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Petitioner respectfully petitions this Court for issuance of its Writ of Certiorari as follows:

INTRODUCTION

The federal Petroleum Marketing Practices Act (hereinafter "PMPA"), 15 United States Code § 2801, et seq., protects the nation's gasoline station franchisees from an abusive trade practice, arbitrary termination of their franchises by oil companies. *Brach v. Amoco Oil Co.* (1982) 677 Fed. 2d 1213, 1220-1221. Generally, a federal statute may be enforced by action brought in state courts—that is, concurrent state court and federal court jurisdiction is the rule, and exclusive federal court jurisdiction to enforce a federal statute is an exception. *Gulf Offshore Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473; *Hathorn v. Lovorn* (1982) 457 U.S. 255.

> "The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication."
>
> *Gulf Offshore Co., supra*, at pp. 477-478

Following the general rule, the State of Pennsylvania has held that Pennsylvania state courts have concurrent jurisdiction to enforce the PMPA. *Johnson v. Mobil Oil Corp.* (1987) 528 A.2d 155, 163-164. The State of California has recently taken the opposite position, however, holding that federal courts have exclusive jurisdiction to enforce the PMPA. Appendix A, Part V, pages 26-28;

Niakan v. Samaan (1988) 199 Cal. App. 3d 716, 245 Cal. Rptr. 24 (Petitioner is informed that a Petition for Certiorari will likewise be filed from *Niakan*). There is no circuit court opinion on this issue; however, the district courts are divided. *Teds Tire Service, Inc. v. Chevron U.S.A. Inc.* (1979) 470 F. Supp. 163 (D. Conn.) (finding concurrent state court jurisdiction); *Rustom v. Atlantic Richfield Co.* (1985) 618 F. Supp. 210 (C.D. California) (finding exclusive federal court jurisdiction). At least seven other states have exercised jurisdiction over the PMPA in reported decisions, *infra*.

Whether state courts enjoy concurrent jurisdiction to enforce the PMPA is the issue presented by this Petition.[1]

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is printed in Appendix A hereto, and is reported, in part, as *Kreisher v. Mobil Oil Corp.* (1988) 198 Cal. App. 3d 389, 243 Cal. Rptr. 662. The Court of Appeal declined to publish that portion of the opinion related to the Petroleum Marketing Practices Act.

1. If Petitioner prevails on the concurrent jurisdiction issue, the case will require remand to the California Court of Appeal in order to consider whether Petitioner's suit was filed timely under 15 U.S.C. § 2805(a). The California Court of Appeal declined to consider the statute of limitations issue as moot in light of its jurisdiction decision. Appendix A, pp. 27-28.

JURISDICTION

The grounds on which jurisdiction of the Court is invoked are:

On February 5, 1988, the Court of Appeal of the State of California, First Appellate District, Division Four, filed its opinion in this case reversing Petitioner's judgment for damages entered on non-PMPA causes of action, and affirming the state trial court's ruling that the federal courts hold exclusive jurisdiction over PMPA causes of action. The applicable portion of the Court of Appeal opinion is set forth in Appendix A, pp. 26-28, attached hereto.

On March 5, 1988, the California Court of Appeal filed its order denying KREISHER's Petition for Rehearing.

On May 5, 1988, the California Supreme Court filed its Order denying KREISHER's Petition for Review in the California Supreme Court, and this Petition has been filed within ninety days of that date.

Jurisdiction for review exists pursuant to United States Supreme Court Rules, Rule 17.1(b) and 17.1(c) by reason of conflict between state courts on a federal issue. The exclusive federal jurisdiction holdings of the California Court of Appeal here, and in *Niakan v. Samaan*, *supra*, 199 Cal. App. 3d 716, directly conflict with the Pennsylvania state court holding of *Johnson v. Mobil Oil Corp. (Pa. Super.)*, *supra*, 528 A.2d 155, 163-164, and the exercise of jurisdiction by other states (Rule 17.1(b)).

The issue of concurrent state court and federal court jurisdiction, or the alternative of exclusive federal court

jurisdiction, presents an important question of federal law which should be settled by this Court in that diametrically opposite decisions have been published on this issue by both state and federal courts, confusion and inconsistency prevail, and an exclusive federal court jurisdiction rule will deprive gasoline station franchisees with businesses located in areas remote from federal courts of obtaining the protective benefits of the Petroleum Marketing Practices Act. This Court has not heretofore considered any issues arising under the Petroleum Marketing Practices Act, and this is a heavily litigated statute as indicated by the annotations to West's U.S. Code Annotated.

The validity of proceedings involving the PMPA undertaken in the state courts will remain open to question until the concurrent jurisdiction issue is resolved.

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STATUTORY PROVISIONS INVOLVED

This case involves the Petroleum Marketing Practices Act, 15 United States Code §§ 2801-2806, the provisions of which are set forth in Appendix D. The jurisdictional language of the PMPA at issue in the present petition is contained at 15 U.S.C. § 2805(a) as follows:

> "If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action *may be brought*, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in

which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of —

"(1) The date of termination of the franchise or nonrenewal of the franchise relationship; or

"(2) The date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title."

(emphasis added)

STATEMENT OF CASE

(A) Facts and lower court proceedings.

By his complaint, Petitioner KREISHER sought damages stemming from two courses of conduct by MOBIL and its employees. The first, having to do with MOBIL's refusal to consider reasonably KREISHER's efforts to assign his franchise, is outside the purvue of the Petroleum Marketing Practices Act. 15 U.S.C. § 2806. Petitioner was awarded a verdict and judgment of $2.2 million dollars for that conduct, which the California Court of Appeal reversed on grounds not pertinent here (Appendix A, Part I, App. p. 24).

MOBIL's second course of conduct was the systematic destruction of KREISHER's business by MOBIL's credit policies and MOBIL's wrongful termination of KREISHER's franchise in violation of the Petroleum Marketing Practices Act. KREISHER remained in possession of the station until January, 1982.

KREISHER's original Complaint, which included allegations that MOBIL had violated the provisions of 15 U.S.C. § 2801 et seq., the PMPA, was filed August 5, 1982. After a six-week jury trial in 1985, the jury's special verdict found that MOBIL's attempted termination of KREISHER's franchise violated the provisions of the Petroleum Marketing Practices Act. MOBIL has never contested the sufficiency of evidence supporting the special verdict.

Under the Petroleum Marketing Practices Act a franchisor such as MOBIL may terminate a franchise such as KREISHER's only if the franchisor meets the notification requirements of 15 U.S.C. § 2804 and if the termination is based upon a ground described in § 2802(b)(2). In substantial part MOBIL's attempted termination of KREISHER's franchise was because of KREISHER's alleged failure to comply with all of the terms and conditions of the franchise contracts and failure to operate the gasoline station for a period in excess of seven consecutive days. Under the terms of the PMPA and case law interpreting it, however, the term "failure" does not include failure for a cause beyond the reasonable control of the franchisee. 15 U.S.C. § 2801(13)(B). A franchisor may not terminate a franchise on account of the franchisee's failure to operate the station or comply with the franchise contracts if the franchisor makes it impossible for the franchisee to earn a profit or to sell gasoline, and the consequent lack of profit or gasoline causes the failures on which the alleged termination is based. *Marini v. Atlantic Richfield Co.* (1979) 475 F. Supp. 142; *Prestin v. Mobil Oil Corp.* (1984) 741 F.2d 286 (9th Cir.).

The evidence adduced at trial established MOBIL's deliberate effort to put KREISHER out of business through restrictive credit policies which were contrary to the contractual terms of KREISHER's franchise.

KREISHER first became franchisee of a MOBIL station located in San Rafael, California, on December 6, 1971 (Reporter's Transcript of proceedings at trial, hereinafter abbreviated "RT," at page 606). At all times while KREISHER was the franchisee at his station, through 1981, his contracts with MOBIL purported by their terms to permit KREISHER to pay for his gasoline supply deliveries by payment to the driver of MOBIL's tank truck while deliveries were made at his station (RT 153, transcript of a.m. trial session of Oct. 11, 1985).

Due to financial difficulties primarily related to the oil shortage crisis commencing in 1973, two gasoline payment checks which KREISHER delivered to MOBIL failed to clear, first in 1975 and then in 1976 (RT 621, 625-626, 1037). Without any prior notice to him, MOBIL placed KREISHER on "walk-in-mail-in" certified funds credit status, which required KREISHER to pay for gasoline supplies in Los Angeles by certified check or money order. This new credit policy also required that before KREISHER was entitled to place a new order for gasoline in San Rafael, just north of San Francisco, and before MOBIL would accept KREISHER's delivery order at MOBIL's supply terminal located in the San Francisco Bay Area, KREISHER had to deliver the certified check payment to the *Los Angeles* credit office of MOBIL. Finding that the mail and other delivery services were too slow and too unreliable, KREISHER or an employee often had to fly

to Los Angeles to deliver these payments (RT 625-626, 643-646). MOBIL made this punitive and unreasonable demand despite the fact that MOBIL had a regional office in the San Francisco Bay Area which could have receipted for KREISHER's certified check, and despite the fact that MOBIL delivered its gasoline supplies to KREISHER from a Bay Area terminal (RT 625-626, 1156).

MOBIL held KREISHER on "walk-in-mail-in" for approximately nine months (RT 626). Although KREISHER had by then hired an independent bookkeeper to avoid bookkeeping problems, the bookkeeper allowed a minor overdraft to occur and in May, 1977, a third KREISHER check to MOBIL was overdrawn by a small sum less than $500.00 (RT 636-637). Even though Mr. KREISHER had not personally erred, MOBIL summarily and permanently returned KREISHER to "walk-in-mail-in" credit status in May, 1977 (RT 2274). From that date forward through 1981 when Mr. KREISHER bought his last load of gasoline, despite a good payment record, MOBIL never released Mr. KREISHER from "walk-in-mail-in" (RT 637). No one from MOBIL was willing to tell KREISHER the rules of "walk-in-mail-in;" Mr. KREISHER did not know when, how, or why he might be freed from it, knowing only that "improving" his financial statement might help (RT 637-638, 1039, 1060-1061, 1160).

The effect of the MOBIL "walk-in-mail-in" policy was to strangle the gasoline station's business (RT 1940-1942). Because of "walk-in-mail-in" Mr. KREISHER was out of gas as much as ten days in a given month (RT 643-647). Mr. KREISHER was therefore placed in the position of trying to meet his full overhead on the station

and meet the living expenses of his family, and pay the additional expense of delivering checks to Los Angeles, while he was restricted to operating the station to as little as 20 days per month (ibid). His efforts to continue to operate the station eventually failed, and after his efforts to sell his franchise to any new dealer met total frustration, Mr. KREISHER finally gave up and delivered the keys of the station to MOBIL on January 11, 1982 (RT 1786-1787). The successor dealer, free of the problems KREISHER suffered as a result of MOBIL's abusive credit policies, ran the station successfully (RT 1464-1479).

This was the factual background upon which the jury found that MOBIL's termination of KREISHER's franchise violated the PMPA.

Following the favorable special verdict on the PMPA cause of action, KREISHER sought from the trial court both attorneys fees and also punitive damages as a result of MOBIL's violation of the Petroleum Marketing Practices Act (the court alone is authorized to award punitive damages for a Petroleum Marketing Practices Act violation—15 U.S.C. § 2805(d)(2)). The state trial court likewise heard MOBIL's post-trial motion for new trial and motion for judgment notwithstanding the verdict. In its rulings on these motions, the court granted MOBIL's motion for judgment notwithstanding the verdict in respect to the Petroleum Marketing Practices Act cause of action on the basis of exclusive federal court jurisdiction. The trial court stated its opinion that the court felt the PMPA statute of limitations had expired in any event (*see* footnote 1, *supra*). Judgment was accordingly entered in favor of Plaintiff on his non-PMPA causes of action and in favor of MOBIL on the PMPA cause of action.

MOBIL appealed those portions of the judgment awarding damages to KREISHER; KREISHER cross-appealed from the denial of relief under the Petroleum Marketing Practices Act. The California Court of Appeal, First Appellate District, Division Four, reversed the judgment in favor of KREISHER, holding that MOBIL was entitled to arbitrarily refuse to consent to assignment of the franchise (holding that a California Supreme Court decision favoring KREISHER's contentions should not be applied retroactively). The Court of Appeal affirmed the trial court's holding that there was exclusive federal jurisdiction for Petroleum Marketing Practices Act causes of action. The Court of Appeal opinion, filed February 5, 1988, is attached as Appendix A. On March 5, 1988, the California Court of Appeal filed its order denying KREISHER's petition for rehearing. The Court of Appeal order is attached as Appendix B (App. p. 31). On May 5, 1988, the California Supreme Court filed its summary order denying review of the Court of Appeal decision. A copy of the order of the California Supreme Court denying review is attached as Appendix C (App. p. 32). Both in the petition for rehearing in the Court of Appeal and in the petition for review in the California Supreme Court, the PMPA jurisdictional issue was raised.

(B) MOBIL's assertion of the exclusive federal jurisdiction issue.

Although more than three (3) years elapsed from the date that KREISHER first filed his complaint on August 5, 1982, contending that MOBIL violated provisions of the Petroleum Marketing Practices Act and seeking relief thereunder, to the date of trial, during that period of time

MOBIL never challenged the jurisdiction of the state court to hear the Petroleum Marketing Practices Act violation claims. Prior to the date of trial, there was a uniform body of state and federal law which either concluded or assumed that there was concurrent state court and federal court jurisdiction for claims brought under the Petroleum Marketing Practices Act. The only pre-trial federal court case which considered the issue held in favor of concurrent state court jurisdiction: *Ted's Tire Service, Inc. v. Chevron U.S.A., Inc.* (1979) 470 F. Supp. 163 (D. Conn.). Pre-trial state court decisions included: *Cianci v. Sup. Ct.* (1985) 40 Cal. 3d 903, 908-909 ("[I]n the Petroleum Marketing Practices Act (15 U.S.C. § 2801, et seq.), for example, Congress created a private right of action without limiting jurisdiction to federal courts"); *Calif. ARCO Dist., Inc. v. Atlantic Richfield Co.* (1985) 158 Cal. App. 3d 349, 364 ("[We] are cognizant that state courts have concurrent jurisdiction to enforce the PMPA . . ."); *Bates v. Chevron* (1979) 260 S.E. 2d 367, 151 Ga. App. 544; *Walters v. Chevron U.S.A., Inc.* (1980) 269 S.E. 2d 495, 154 Ga. App. 636; *Ricco v. Shell Oil Co.* (1981) 434 A.2d 1151, 180 N.J. Super. 399; *DaCosta's Automotive, Inc. v. Birchwood Plaza Shell, Inc.* (1984) 482 N.Y.S. 2d 832; *Frankard v. Amoco Oil Co.* (1983) 342 N.W. 2d 247, 116 Wis. 2d 254.

MOBIL raised the jurisdiction issue for the first time during the course of trial. On November 6, 1985 MOBIL brought a motion for non-suit as to Petitioner's PMPA violation allegations only after the opinion was filed in *Rustom v. Atlantic Richfield Co.* (Sept., 1985) 618 F. Supp. 210 (C.D. Cal.), the first reported case to accept a contention that federal courts hold exclusive jurisdiction to

consider claims under the Petroleum Marketing Practices Act. At the time that MOBIL's non-suit motion was made, the trial court denied the motion and the issue went forward to a successful special verdict for KREISHER. Subsequently, however, the trial court reversed itself and upheld MOBIL's exclusive federal jurisdiction contention at the time of MOBIL's motion for judgment notwithstanding the verdict. The California Court of Appeal upheld the exclusive federal jurisdiction ruling (Appendix A, pp. 27-28).

The appellate court for the State of Pennsylvania considered and expressly rejected *Rustom* in *Johnson v. Mobil Oil Corp.* (1987) 528 A.2d 155 (Pa. Super.). Recently, another District of the Court of Appeal of the State of California (Second District, Division Five) has sided with the court decision below and with *Rustom*, finding exclusive federal jurisdiction in *Niakan v. Samaan* (1988) 199 Cal. App. 3d 716, 245 Cal. Rptr. 24.

At present at least seven states in addition to Pennsylvania in fact have exercised PMPA jurisdiction—Connecticut, Georgia, Illinois, Louisiana, New Jersey, New York and Wisconsin.[2]

2. Connecticut (*Consumers Pet. of Conn., Inc. v. Duhan*) (Conn. Super. 1982) 452 A.2d 123, 38 Conn. Sup. 495; Georgia (*Bates v. Chevron, supra; Walters v. Chevron U.S.A., supra*); Illinois (*ARCO Petroleum Products Co. v. Williams* (1986) 496 N.E. 2d 1098, 146 Ill. App. 3d 218, 100 Ill. Dec. 33); Louisiana (*Thomas v. Amoco Oil Co.* (La. App. 4 Cir. 1984) 455 So. 2d 1187 (Rev. denied by Louisiana Supreme Court Nov. 16, 1984, 460 So. 2d 612); *ERA Enterprises, Inc. v. Gulf Oil Corp.* (La. App. 4 Cir. 1987) 506 So. 2d 160); New Jersey (*Ricco v. Shell Oil Co., supra*); New York (*DaCosta's Automotive, Inc. v. Birchwood Plaza Shell, Inc., supra*); and Wisconsin (*Frankard v. Amoco Oil Co., supra*).

SUBSTANTIALITY OF FEDERAL QUESTION

This case presents an issue of considerable importance to the petroleum industry and the tens of thousands of retail gasoline station franchisees who rely upon the provisions of the Petroleum Marketing Practices Act to protect them from abusive or arbitrary conduct, which the Petroleum Marketing Practices Act was designed to prevent. *Brach v. Amoco Oil Co., supra.* The problem is of a practical nature: virtually every petroleum station businessman has available to him a reasonably convenient state court in which to pursue his claim, most likely with an attorney who is reasonably accessible to the gasoline station dealer, familiar with the dealer's business affairs, and familiar with state court procedure. On the other hand, a great majority of gasoline station dealers have their businesses located in areas relatively remote from federal district courts. For example, in the event of exclusive federal jurisdiction, gasoline station dealers in northern California coastal communities such as Eureka or Piercy would need to hire expensive San Francisco attorneys hundreds of miles away who have no working familiarity with the franchisee's business circumstances to represent such dealers in the Federal District Court in San Francisco regarding a PMPA violation.

The impact of an exclusive federal jurisdiction finding regarding the PMPA would not be limited to dealers, but would also greatly affect the district courts. Not only would the district courts be required to consider complaints by dealers claiming damages for violation of the Petroleum Marketing Practices Act, but in practice, many franchise relationships involve a premises lease agree-

ment in conjunction with a gasoline supply and trademark agreement. *E.g., Prestin v. Mobil Oil Corp., supra,* 741 F.2d 268, 272. A franchisor which contends that it has grounds to terminate a franchise generally is required to bring an unlawful detainer or eviction action to regain possession of the premises which are leased to the dealer as part of the franchise relationship. These suits are almost invariably brought in state court in California. The gasoline station franchisee may need to raise PMPA violations as a defense to the unlawful detainer complaint. If state courts lack jurisdiction to hear Petroleum Marketing Practices Act violation claims, dealers against whom unlawful detainer actions are brought will be required to remove those actions to federal court in order to raise PMPA defenses. *See, e.g., Niakan v. Samaan, supra.*

The Supreme Court has long articulated and unequivocally affirmed the doctrine that state courts have concurrent jurisdiction to enforce rights created by federal law in the absence of an articulated or unmistakeably inferrable congressional intention to create exclusive federal jurisdiction. *Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. 473; *Dowd Box Co. v. Courtney* (1962) 368 U.S. 502.

Typically, state courts have interpreted permissive federal court jurisdictional language such as that contained in the PMPA, 15 U.S.C. § 2805(a), as creating concurrent state and federal court enforcement jurisdiction. For example, in *Cianci v. Sup. Ct.* (1985) 40 Cal. 3d 903, 710 P.2d 375, the California Supreme Court found concurrent state court jurisdiction to consider claims brought under the federal RICO statute (18 U.S.C. § 1961, et seq.).

Just as the PMPA provides that an aggrieved franchisee "may" file a claim in federal district court (15 U.S.C. § 2805(a)), the RICO statute likewise simply provides that a private right of action under RICO "may" be brought in the federal district court (18 U.S.C. § 1964(c)). It is the absence of language in the Petroleum Marketing Practices Act mandating exclusive federal jurisdiction, or even indicating that Congress sought by implication to create exclusive federal jurisdiction, which caused the Pennsylvania court in *Johnson v. Mobil Oil Corp., supra*, to reject the contention of exclusive federal jurisdiction over the PMPA. The *Johnson* court held:

> "We see no reason for precluding a state from adjudicating a contractual claim arising under the PMPA, especially where, as here, we deal with a clear dictate of federal law. As noted above, the presumption of concurrent jurisdiction can be rebutted by explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. The PMPA does not expressly limit jurisdiction to federal courts, and we find no clear indication of exclusive jurisdiction in the legislative history. Finally, we perceive no incompatibility between state-court jurisdiction and promoting Congress' intent to protect the needs of both franchisees and franchisors, to remedy disparity in bargaining power and to protect arbitrary or discriminatory termination or nonrenewal. For the foregoing reasons, we find that a state court enjoys concurrent jurisdiction over claims brought under the PMPA." (citations omitted) *Johnson v. Mobil Oil Corp., supra*, 528 A.2d 155, 164.

Indeed, the very language of 15 U.S.C. § 2805(a) supports a conclusion that Congress in fact intended to confer

concurrent jurisdiction. The first sentence of the section reads:

> "If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor."

That sentence entitling the franchisee to pursue a civil action against the franchisor does not contain any restriction as to the forum in which the franchisee's civil action may be pursued. The subsequent sentence of the PMPA then appears to clarify Congress' intent to give to the franchisor the broadest possible access to *all* courts by expressly deleting a potential jurisdictional defense regarding the amount in controversy if the franchisor elects to pursue his claim in the federal District Court:

> "Such action may be brought, without regard to the amount in controversy, in the District Court of the United States . . ."

Language in other sections of the PMPA likewise indicates Congress' intent to permit or enlist state court enforcement of the Act. The preemption language of the Act, section 2806(a), only precludes state enforcement of state law which *differs* from the provisions of the PMPA (Appendix D, p. 53). If the state's "provision of [. . .] law or regulation is the same as the applicable provision of the [PMPA]" it is *not* preempted, and state enforcement of any such law may continue. If states may enforce state laws identical to the PMPA, obviously Congress did not intend to preclude states from enforcing the PMPA itself. Similarly, section 2804(b)(2)(B), setting forth additional notification requirements for a franchisor which intends to discontinue retail business in a geographic area, requires the franchisor to give notice "to the Gov-

ernor of each state which contains a portion of such area" (Appendix D, p. 48). Why alert state governments if no state enforcement role is contemplated?

The conclusion of *Johnson v. Mobil Oil Corp., supra*, is thus supported by the language of Congress contained in several parts of the PMPA.

The primary contrary opinion favoring exclusive federal jurisdiction is *Rustom v. Atlantic Richfield Co., supra*, 618 F. Supp. 210.[3]

It is apparent that the reasoning of *Rustom* is flawed. The *Rustom* court attempts to analogize the PMPA jurisdictional language of 15 U.S.C. § 2805(a) to the jurisdictional language of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)-5(f)(3)). The Civil Rights Act, however, provides that each district court "*shall*" have jurisdiction to enforce Civil Rights Act claims (*ibid*; emphasis added). This mandatory language has been held to confer exclusive federal jurisdiction. *Valenzuela v. Kraft, Inc.* (1984) 739 F.2d 434. Further, the Civil Rights Act contains a reference to federal civil procedure which, unlike the reference in the Petroleum Marketing Practices Act, does establish

3. The opinion in *Niakan v. Samaan, supra*, 199 Cal. App. 3d 716, 245 Cal. Rptr. 24, accedes in its entirety to the reasoning of *Rustom*, as does the Court of Appeal opinion in this action. The Pennsylvania court in reviewing *Rustom*, however, found *Rustom's* analysis of the legislative history of the PMPA wanting. That is, *Rustom* simply noted a "conspicuous absence" of any reference in the legislative history to bringing a PMPA cause of action in state court (*Johnson v. Mobil Oil Corp., supra*, at 163, reviewing *Rustom*, 618 F. Supp. at 212). *Johnson* rejected *Rustom's* conclusion that the PMPA's incorporation of standards under the Federal Rules of Civil Procedure for the award of damages and for the issuance of preliminary injunctions constituted either an "unmistakable implication" that Con-

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an "unmistakable implication" of exclusive federal jurisdiction: the Civil Rights Act, at 42 U.S.C. § 2000(e)-5(j), provides that any civil action brought under the Act shall be subject to appeal in the United States Court of Appeal. As *Valenzuela* points out, "Congress could not have intended that actions brought in state court be appealed to the federal circuit courts." *Valenzuela, supra*, 739 F.2d at 435. The incorporation into the PMPA of Federal Rules of Civil Procedure relating to the award of damages and the manner for issuance of preliminary injunctions, however, merely sets guidelines for trial courts to follow. These guidelines in no manner give rise to the level of state and federal court jurisdictional incompatibility such as that created by the language of the Civil Rights Act, which would require state court decisions to be subjected to federal appellate review if state courts enjoyed concurrent jurisdiction to consider Civil Rights Act claims.

Rustom is neither historically well-founded nor convincing in its review of the legislative history of the PMPA. Its effect in depriving many gasoline station dealers of access to justice by requiring dealers to pursue their PMPA claims in far-off federal courts is ill-considered and runs contrary to the congressional intent of protecting

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gress intended exclusive federal court jurisdiction or that the reference to the Federal Rules of Civil Procedure established clear incompatibility between state court jurisdiction and federal interests, relying on the Supreme Court's review of similar issues in *Gulf Offshore Co. v. Mobil Oil Corp., supra,* 453 U.S. 473, *Dowd Box Co. v. Courtney, supra,* 368 U.S. 502 (1962), and the consistent intention to confer the maximum jurisdiction possible upon state courts as articulated by Alexander Hamilton in *The Federalist No. 82,* and by this Court in *Claflin v. Houseman* (1876) 93 U.S. (3 Otto) 130, 139, 23 L. Ed. 833.

gasoline station dealers from abusive franchise practices. Furthermore *Rustom* was to a substantial extent based upon *Valenzuela*. This is illogical: the civil rights legislation at issue in *Valenzuela* was made necessary because of the long history of discrimination against blacks in the southern states. Congress might justifiably have been concerned that the protections of the Civil Rights Act would be inhibited by state court enforcement of its provisions. On the other hand, a substantial number of states have had experience in cases involving termination of petroleum leases and franchises and in enacting the PMPA there was no reason for Congress to anticipate any discrimination problem. As shown by the limited preemption language of the PMPA, 15 U.S.C. § 2806(a), uniformity of franchise termination rules was the goal of the PMPA, not prevention of discrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant its Writ of Certiorari to review the decision of the California Court of Appeal in this case in order to resolve the conflict of decisions between the California Court of Appeal and the diametrically opposite decision of the Court of the State of Pennsylvania, and to decide this important question of federal law, as to which lower federal courts are also in disagreement, re-

garding concurrent state court jurisdiction over claims brought under the Petroleum Marketing Practices Act.

Dated July 29, 1988

Respectfully submitted,

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/s/ John R. Wolf
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DENZIL G. KREISHER

APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DENZIL KREISHER,

Plaintiff and Appellant,

A036017

v.

(Marin Super. Ct.
No. 108816)

MOBIL OIL CORPORATION et al.,

Defendants and Appellants.

The primary issue presented is this: Are judicial decisions holding that a contracting party's right to refuse consent to an assignment must be exercised in accordance with standards of commercial reasonableness and good faith to be retroactively applied to a situation where a contrary rule prevailed at the time all actions which sub-

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* Parts II through IX are not ordered published, as they do not meet the standards for publication contained in rule 976(b) of the California Rules of Court.

sequently formed the basis for this litigation occurred? Our answer is no.

BACKGROUND AND PROCEDURAL HISTORY

The following is an abbreviated narrative of a massive record, restricted to those matters germane to the limited approach and holding adopted for purposes of resolving these appeals.

From 1971 through 1980, plaintiff Denzil G. Kreisher operated a service station in San Rafael. Plaintiff's franchise relationship with defendant Mobil Oil Corporation (Mobil) throughout this period was governed by a trio of contracts. Each contract, which had a term of three years, was comprised of a pair of documents, a "Retail Dealer Contract" and a separately executed "Service Station Lease." On December 22, 1980, plaintiff and Mobil formally executed a new agreement continuing plaintiff's franchise and tenancy for the period commencing January 1, 1981, and concluding December 31, 1983. Included in the "Retail Dealer Contract" and the "Service Station Lease" were provisions forbidding assignment without Mobil's written consent.[1] The following events occurred in 1981:

Plaintiff received a letter from Mobil on May 6th informing him that "you are in default of the Lease by

1. Paragraph 18 of the "Retail Dealer Contract" read: "Any assignment of this contract by Buyer [plaintiff] without Seller's [Mobil's] written consent shall be void." Paragraph 15 of the "Service Station Lease" read: "Any assignment, mortgage or pledge of this lease or any interest therein or any subletting of the premises, in whole or in part, by Tenant [plaintiff] without Landlord's [Mobil's] written consent shall be void."

reason of failure to operate the marketing premises for more than seven consecutive days" and that unless this default was cured within ten days Mobil "will terminate said Lease effective May 18." Plaintiff notified Mobil, by a letter dated May 12th, that he had received an offer from Robert Gregory Enterprises, Inc. to purchase the franchise for $28,000. Plaintiff asked "whether Mobil will consent to the transfer." Six days later, Mobil sent plaintiff a letter announcing its election to "terminate the Service Station Lease and franchise relationship between us, effective June 18." On May 28th plaintiff was notified by letter that "Mobil does not consent to the proposed transfer."

Mobil learned in early June that plaintiff had not maintained insurance as required by the contract. It therefore, on June 16th, transmitted a notice to plaintiff advising him that this and other acts and omissions constituted "further default" which Mobil "considered substantial in nature and make termination of your franchise, effective June 18, . . . reasonable and necessary." Mobil learned several days later that plaintiff's resale permit had been revoked by the State Board of Equalization effective March 31st of that year. Mobil served on plaintiff a three-day notice to quit the premises on June 29th.

In July plaintiff advised Mobil that he had a further offer of $31,000 from Cesar Faedi for the franchise, again asking "if Mobil wishes to purchase the franchise or will consent to the transfer to Mr. Faedi."[2] Mobil apparently rejected both aspects later that month when it responded

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2. Plaintiff's offer that Mobil itself purchase the franchise purported to be based upon Business and Professions Code section 21148, subdivision (a), which provides:

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that "the proposed assignment may be considered in light of existing circumstances."

Mobil initiated an unlawful detainer proceeding against plaintiff in September. About that time plaintiff submitted a third and final proposed assignment,

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"Notwithstanding the terms of any franchise, a franchisor may not withhold its consent to the sale, transfer, or assignment of the franchise by the franchisee to another person unless the franchisor demonstrates any of the following:

"(1) The proposed purchaser of the franchise has less business experience and training than that normally required by the franchisor of prospective franchisees.

"(2) The proposed purchaser of the franchise has less financial resources than that normally required by the franchisor of prospective franchisees.

"(3) The proposed purchaser of the franchise does not satisfy the then-current uniformly applied requirements, if any, of the franchisor applicable to prospective franchisees.

"(4) The proposed purchaser of the franchise operates a franchise under an agreement with a franchisor other than the franchisor to whom the sale, transfer, or assignment is proposed, if the then-current uniformly applied requirements, if any, of the franchisor precludes prospective franchisees from operating a franchise under an agreement with another franchisor.

"(5) The franchisee has not offered in writing to sell, transfer, or assign the franchise to the franchisor on terms and conditions which are the same as those of the sale, transfer, or assignment of the franchise to the proposed purchaser; and the franchisee has not allowed the franchisor at least 30 days in which to either accept or decline the franchisee's written offer, prior to the sale, transfer, or assignment of the franchise to the proposed purchaser."

This statute was added by an enactment which became effective on January 1, 1981, and which specifically provided that "This act shall not apply to a franchise entered into before the effective date of this act." (Stats. 1980, ch. 698, § 4, p. 2101.)

After plaintiff had notified Mobil of the Gregory offer, he invoked Business and Professions Code section 21148 when he offered to sell the franchise to Mobil on the same terms as the Gregory offer. Mobil responded that plaintiff's 1980 contract was not governed by the subsequently-enacted statute.

which was apparently rejected by Mobil in the belief that plaintiff no longer had any interest to assign. Plaintiff relinquished possession of the premises in January of 1982 without the necessity of judicial action.

Plaintiff commenced this action on August 5, 1982. In its final form, his complaint purported to allege eight causes of action which may be identified as follows: (1) breach of the contract and implied covenants of good faith and fair dealing for Mobil's "failing and refusing to consent to transfer or sale of the franchise and lease without reasonable or permissible grounds . . . and . . . by withholding consent . . . although each of such proposed franchise purchasers was ready, willing, able and qualified to perform all obligations of a franchisee and leasee [*sic*];" (2) unreasonable withholding of consent to a transfer in violation of Business and Professions Code section 21148 (see fn. 2 and accompanying text, *ante*); (3) "wrongful and retaliatory constructive eviction constituting termination of the franchise without good cause;" (4) "tortious breach of implied covenants of good faith and fair dealing" for Mobil's "failing and refusing to process and allow sale . . . of the franchise;" (5) negligent interference with prospective economic advantage; (6) intentional interference with prospective economic advantage; (7) intentional infliction of emotional distress for a variety of acts including the "refus[al] to provide reasonable explanation for . . . withholding of consent to transfer the franchise" and evicting plaintiff "from the gasoline station premises;" and (8) violation of the federal Petroleum Marketing Practices Act (PMPA; 15

U.S.C. § 2801 et seq.).[3] After sustaining a demurrer without leave to amend the second cause of action, the trial court granted defendants summary judgment on plaintiff's third, fourth and fifth causes of action, but ruled that the remainder of plaintiff's case presented material issues of fact to be decided by a jury.

Trial commenced on October 9, 1985. The presentation of evidence occupied five weeks. On December 3d, having deliberated on plaintiff's first, sixth, seventh, and eighth causes of action for seven days, the jury returned its verdict finding (among other things) that: (1) Mobil breached its contract with plaintiff by refusing to consent to the proposed transfer; (2) defendants intentionally interfered with plaintiff's prospective economic advantage; and (3) defendants intentionally inflicted emotional distress upon plaintiff. The jury further found plaintiff entitled to recover compensatory damages of $214,000 (including $31,000 for loss of his home) and punitive damages of $2,002,500.

After the jury had been discharged, the court filed an order in which it: (1) denied plaintiff any recovery pur-

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3. Named as defendants in the complaint were Mobil and its employees R.E. Kolberg, Kevin J. Reilly, Joseph B. Wright, and James A. Edwards. The complaint was dismissed as against Kolberg. With respect to Reilly and Wright, the jury was unable to return a verdict and further proceedings are being held in abeyance pending this outcome of these appeals. Edwards, who together with Mobil, will hereinafter be collectively referred to as defendants, is at present liable with Mobil for the compensatory damages and costs awarded plaintiff, as well as $2,500 punitive damages.

The complaint was also filed on behalf of plaintiff's wife Dorothy Kreisher. The jury was unable to reach agreement concerning her claims. She is not a party to this appeal.

suant to his PMPA cause of action on the dual grounds that "federal courts have exclusive jurisdiction over actions brought under the PMPA" and "plaintiff's PMPA claim is barred by the statute of limitations" included in that statutory scheme; and (2) granted plaintiff's request for prejudgment interest pursuant to Civil Code section 3291 and Code of Civil Procedure section 998. On May 20, 1986, the court entered a judgment directing that plaintiff recover compensatory damages of $214,000, punitive damages of $2,002,500, both with interest from the date of plaintiff's compromise offer made in May of 1983, and costs of $22,719.24, on his first, sixth, and seventh causes of action. The judgment was in defendants' favor on all remaining causes of action.

Defendants then filed a conjoint motion for judgment notwithstanding the verdict and for new trial. In connection therewith the trial court filed an order in which it: (1) denied the motion for judgment n.o.v.; (2) conditionally granted the alternative motion for a new trial unless plaintiff consented to a reduction in the judgment of $31,000, representing the amount of equity in the home plaintiff had sold as an alleged consequence of his dispute with Mobil; and (3) vacated the award of prejudgment interest.

Defendants thereupon filed a timely notice of appeal from the judgment. Plaintiff has appealed from the new trial order and from the order rejecting his PMPA cause of action. Plaintiff has also taken a protective cross-appeal from various portions of the judgment.

REVIEW

I

The contractual provisions at issue here (see fn. 1, *ante*) gave Mobil the express right to refuse its consent to a proposed transfer of plaintiff's franchise. No restriction upon Mobil's exercise of that right is apparent from the plain language of the provisions, which are therefore to be treated as conferring an absolute and unfettered discretion justifying a refusal without regard to the nature or even enunciation of any objection. The evolution and doctrinal explanation of how such a power came to be subject to considerations of commercial reasonability and the implied covenant of good faith and fair dealing is recounted in *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, and consequently need not be repeated here. More relevant for present purposes is the synthesis of that history and the chronology of events in this case.

" '[W]here a subletting or assignment of the leased premises without the consent of the lessor is prohibited, he may withhold his assent arbitrarily and without regard to the qualifications of the proposed assignee, unless, . . . the lease provides that consent shall not be arbitrarily or unreasonably withheld, and in granting his assent may impose such conditions as he sees fit. Accordingly, if . . . the lessor does not covenant to give his consent to an assignment or subletting, the lessee has no remedy against the lessor for his refusal to consent thereto.' " This 1960 holding by the Court of Appeal in *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 299, stood unimpeached until September of 1983, when a different Court of Appeal concluded in *Cohen v. Ratinoff* (1983) 147 Cal.

App.3d 321, that a lessor could breach a contract by exercising the power to withhold consent in an arbitrary or unreasonable manner incompatible with the duty of good faith and fair dealing. *Cohen* was accepted and followed less than four months later by Division Three of this court in *Schweiso v. Williams* (1984) 150 Cal.App.3d 883.

All of the events at issue here occurred during the period when *Richard* was taken to state the applicable rule of law. The parties' execution of the contract, the termination of plaintiff's franchise, his departure from the premises, and his initiation of this action, had all transpired by October of 1982, 11 months before *Cohen* was decided and 15 months before this court first took a position on the problem in *Schweiso*. Review of neither decision was sought in the Supreme Court. By the time these decisions were final plaintiff had filed his third amended complaint which, with a further amendment permitted by the trial court, was the pleading on which the case would eventually be submitted to the jury.

Further confusion was to follow. In December of 1984 Division Three reversed itself and repudiated its prior decision in *Schweiso*, terming it and *Cohen* "wrongly decided." The occasion for this return to the *Richard* rule was *Kendall v. Ernest Pestana, Inc.*, which the Supreme Court agreed to hear in February of 1985. In *Hamilton v. Dixon* (1985) 168 Cal.App.3d 1004, decided in May of 1985, yet another Court of Appeal followed *Richard* in preference to *Cohen* and *Schweiso*. Our parties were at that time contesting defendants' motion for summary judgment and plaintiff's request for leave to file an amendment to his third amended complaint.

The dust did not settle until December 5, 1985. It was on that date that the Supreme Court filed its *Kendall* opinion, thus aligning itself with the *Cohen-Schweiso* position and disapproving *Richard* and *Hamilton*. (*Kendall v. Ernest Pestana, Inc., supra*, 40 Cal.3d 488 at pp. 496-498.) That was two days after the jury returned its verdict in this case.

Defendants' position at all times has had a dual thrust. They first argue that *Cohen*, *Schweiso*, and later *Kendall* have no application because they dealt with simple commercial leases whereas the fundamental nature of Mobil's contract with plaintiff was a "franchise agreement for personal services." Their fall-back argument is that if these decisions do govern a contract of the sort between plaintiff and Mobil, the decisions contrary to the *Richard* rule upon which defendants relied should not be given retroactive application. Although we disagree with defendants' characterization of the contract as one for personal services, we sustain their contention that *Cohen*, *Schweiso*, and *Kendall* should not be retroactively applied in this case.

(A)

Defendants' attempt to transmute the lease into an inconsequential and severable appendage of the "Retail Dealer Contract" is unconvincing. Included in the latter document immediately following the assignment provision (quoted *ante* at fn. 1) is an integration clause to the effect that "This instrument, including . . . *any lease* of the premises from Seller to Buyer, contain[s] the entire agreement covering the subject matter, and supersedes any prior *supply* contract between the parties *relating to the*

premises." (Emphasis added.) As may be inferred from the underscored passages, this provision evidences Mobil's own view of the relationship between itself and plaintiff as being predominantly concerned with the sale of Mobil's products. The lease provided the site at which these sales would occur. That site, described in the "Retail Dealer Contract" as "the marketing premises," was crucial to the franchise relationship. All deliveries were to be made at that site. The contract could be terminated for a variety of reasons connected with the leasehold, including: (1) termination of the lease; (2) condemnation or destruction of the premises; (3) plaintiff's failure "to operate the marketing premises for 7 consecutive days;" (4) plaintiff's failure "to comply with federal, state or local laws, rules, regulations or ordinances relevant to the operation of the marketing premises;" (5) repeated customer complaints concerning "operation of the marketing premises;" and (6) plaintiff's failure "to operate its premises in a clean, safe and healthful manner." Identical provisions were also included in the lease.

Without question, plaintiff's personal qualifications and labor constituted an important component of the process by which Mobil's goods would be furnished to the public. Yet plaintiff's personal services would be provided, not at any place of his choosing, but only at the "marketing premises" specifically designated in both the "Retail Dealer Contract" and the lease. The idea that plaintiff's personal services were the essence of the relationship is further refuted by the very presence of the assignment provisions: if plaintiff's services were so unique and vital Mobil would have no reason either to contemplate or to make provision for any possible sub-

stitution. What was crucial to Mobil's commercial goal was the provision of a location for sale of its products, particularly an existing location devoted to that purpose and under Mobil's continuing control. Construing the two documents as comprising a single agreement (Civ. Code § 1642; cf. *Mobil Oil Corp. v. Handley* (1978) 76 Cal.App.3d 956, 959, 963; *Prestin v. Mobil Oil Corp.* (9th Cir. 1984) 741 F.2d 268, 271-272), we are compelled to reject defendant's attempt to recast it as being primarily concerned with plaintiff's personal services.

(B)

It is a truism that the law constantly struggles to resolve the tension between the competing needs of stability and change, both of which it must serve. One aspect of this continual dilemma is whether completed events and transactions are to be governed by subsequently announced principles or changes in legal doctrine. This is the nettle we must now grasp.

California follows the rule of practice that decisions of its appellate courts, particularly those of the Supreme Court, are ordinarily retrospective in operation. (See *In re Marriage of Brown* (1976) 15 Cal.3d 838, 850; *Twine v. Compton Supermarket* (1986) 179 Cal.App.3d 514, 518; *McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, 981.) With respect to civil cases, exemptions from this principle have in general been recognized "when considerations of fairness and public policy preclude full retroactivity" (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 152; accord *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 74; *Safeway Stores, Inc. v Nest-Kart* (1978) 21 Cal.3d 322, 333; *Paul E. Iacono Structural Engineer,*

Inc. v. Rizzo (1984) 162 Cal.App.3d 803, 809), particularly if retroactive application of the new authority will disturb vested rights of property or contract. (See *Peterson v. Superior Court, supra; County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 681; cf. *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 953-954; *Abbott v City of Los Angeles* (1958) 50 Cal.2d 438, 456-457.) "The determination by the court is dependent upon the equities in each case." *(County of Los Angeles v. Faus, supra,* at p. 680.)

"Two factors of primary importance in resolving the issue of retroactivity are the extent to which the change in the law was foreshadowed and foreseeable and the extent of the reliance placed upon the former rule of law." *(Barber v. Stat Personnel Bd.* (1976) 18 Cal.3d 395, 400; accord *United States Cold Storage v. Great Western Savings & Loan Assn.* (1985) 165 Cal.App.3d 1214, 1222; *Pillsbury v. South Coast Regional Com.* (1977) 71 Cal.App.3d 740, 755.) In determining the retroactivity of its decisions in the area of criminal law, the United States Supreme Court formulated these criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *(Stovall v. Denno* (1967) 388 U.S. 293, 297.) These criteria have been incorporated within the "considerations of fairness and public policy" factors employed by California in the context of civil cases. "Public policy considerations include the purpose to be served by the new rule, and the effect on the administration of justice of retroactive application. Considerations of fairness would measure the re-

liance on the old standards by the parties or others similarly affected, as well as 'the ability of litigants to foresee the coming change in the law . . . .' " (*Peterson v. Superior Court, supra*, 31 Cal.3d 147 at pp. 152-153.)[4] Each of these factors and considerations will now be examined.

Foreseeability. Can Mobil be charged with failing to anticipate the demise of the *Richard* rule? That rule had stood for more than 20 years by the time it was invoked by Mobil. It is true that there had been academic criticism (see Kehr, *Lease assignments: The landlord's consent* (1980) 55 State Bar J. 108; Note, *Effect of Leasehold Provisions Requiring the Lessor's Consent to Assignment* (1970) 21 Hastings L.J. 516[5] and that the covenant of good faith and fair dealing was being applied to an increasing variety of contracts. (See *Seaman's Direct Buy-*

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4. The standards applied by the United States Supreme Court in deciding the retroactivity of its holdings in civil cases is generally comparable to the matters which guide California courts. The federal civil standards were stated in *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 106-107: "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " (See also *Northern Pipeline Co. v. Marathon Pipe Line Co.* (1982) 458 U.S. 50, 87-88 (plurality opinion); *United States v. Johnson* (1982) 457 U.S. 537, 563.)

5. Plaintiff mentioned only the first of these articles in the trial court.

ing Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 768; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 743-752, pp. 674-683.) On the other hand, *Richard*, which was decided well after the concept of the good faith covenant had been recognized, had never been judicially questioned in this state. Moreover, it conformed with the rule prevailing in the majority of other states throughout the country. (See *Kendall v. Ernest Pestana, Inc., supra*, 40 Cal.3d 488 at pp. 495-496.) *Richard* must also be seen as one aspect of a large body of California authority to the effect that "[i]n the absence of a controlling statute the parties may provide that a contract right or duty is nontransferable." *(Masterson v. Sine* (1968) 68 Cal.2d 222, 230; accord *La Rue v. Groezinger* (1890) 84 Cal. 281, 283; *Benton v. Hofmann Plastering Co.* (1962) 207 Cal.App.2d 61, 67-69; *Parkinson v. Caldwell* (1954) 126 Cal.App.2d 548, 552-553; *Fairbanks v. Crump Irr. etc. Co., Inc.* (1930) 108 Cal.App. 197, 205.)

The matter of foreseeability is thus ambiguous. An argument can be made, albeit concededly upon a purely speculative basis, that the validity of the *Richard* rule was questionable and might be overtaken by the advance of the covenant of good faith and fair dealing. The signals to that effect were, however, weak and largely nonjudicial. The opposing argument is that *Richard* had stood the test of time and could be treated as sound doctrine well within the mainstream of California and national authority. As will be seen shortly, Mobil had received a recent indication that *Richard* was still accepted as stating the governing principle. We therefore conclude that on balance Mobil

should not be penalized for its inability to predict the emergence of the judicial repudiation of *Richard* more than two years later.[6] (Cf. *People v. Horning* (1984) 150 Cal. App.3d 1015, 1022; *People v. Criscione* (1981) 125 Cal.App. 3d 275, 295.)

Reliance. This factor is completely in Mobil's favor. At the time Mobil refused to consent to each of plaintiff's proposed assignees, the *only* authority squarely on point was *Richard.* The contrary holdings of *Cohen, Schweiso,* and *Kendall* were nothing more than glints in the eyes of imaginative attorneys awaiting future vindication. Mobil clearly was aware of *Richard* and acted in accordance with it. About the time the 1980 franchise agreement was executed, Mobil was advised by independent counsel that *Richard* was still valid. Mobil saw this advice upheld when it thereafter won two unrelated actions in federal district courts in California. In short, the extent of Mobil's reliance on the *Richard* rule was total.

Public policy. What are the justifications for restricting a lessor's unfettered power to refuse consent to an assignment? The two reasons given by courts are California's hostility to restraints on alienation and its preference for fostering the performance of contracts in accordance with "the standards of good faith and com-

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6. The emphasis on *judicial* action is not inadvertent. If anything, Mobil could logically conclude that with the passage of Business and Professions Code section 21148 the Legislature had in effect occupied the field and thus obviated the likelihood of further action by the courts. Mobil could further conclude that the Legislature's exemption of franchise agreements "entered into" before January 1, 1981 (see fn. 2, *ante*) preserved the *Richard* rule's applicability to such agreements.

mercial reasonableness." (See *Kendall v. Ernest Pestana, Inc., supra,* 40 Cal.3d 488 at pp. 498-501, 506; *Schweiso v. Williams, supra,* 150 Cal.App.3d 883 at pp. 885-887; *Cohen v. Ratinoff, supra,* 147 Cal.App.3d 321 at pp. 328-330.) In addition, and more particularly, there are the specific statutory limitations of a franchisor's power to refuse consent expressed in Business and Professions Code section 21148. (See fn. 2, *ante.*) Within the context of this case, these judicial and legislative determinations embody a balance between common law rights of contract and the legitimate concerns of lessors. The former are to be limited because "[w]e are no longer in the days of caveat emptor even as to commercial leases . . . [and] the necessity of permitting reasonable alienation of commercial space has become paramount in our increasingly urban society." (*Schweiso v. Williams, supra,* at p. 887.) The latter remain secured because "the lessor's interest in the character of his or her tenant is protected by the lessor's right to object to a proposed assignee on reasonable commercial grounds . . . [and] by the fact that the original lessee remains liable to the lessor as a surety even if the lessor consents to the assignment and the assignee expressly assumes the obligations of the lease." (*Kendall v. Ernest Pestana, Inc., supra,* at p. 500.)

Fairness. The public policy restraining this form of arbitrary action by a franchisor-lessor is strong, but what are the countervailing fairness considerations? Reliance, which has been discussed above, is one such factor. In the circumstances presented here, its influence is crucial.

With respect to obligations undertaken pursuant to a statute subsequently found invalid, the United States Supreme Court stated: "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest . . . that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (*Chicot County Dist. v. Bank* (1940) 308 U.S. 371, 374.) We agree with numerous distinguished commentators (Schaefer, *Prospective Rulings: Two Perspectives*, 1982 Sup. Ct. Rev. 1, 23; Leflar, *Appellate Judicial Innovation* (1974) 27 Okla. L.Rev. 321, 342; Snyder, *Retrospective Operation of Overruling Decisions* (1940) 35 Ill. L.Rev. 121, 132, fn. 117) that these considerations are equally relevant to judicial decisions. Let us now examine how they operate in this case.

One of the fundamental purposes of law is to provide stability. The announcement of a legal principle, whether by the Legislature or by the courts, furnishes notice of what is either allowed or prohibited. Such notice is the

most elemental requirement of due process. (See *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 546; *Fuentes v. Sherin* (1972) 407 U.S. 67, 80; *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314; *Randone v. Appellate Department* (1971) 5 Cal.3d 536, 541; *Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 672; *Conservatorship of Moore* (1986) 185 Cal.App.3d 718, 725.) Blackstone deemed it a "requisite" that legal change "be notified to the people who are to obey it." (1 Blackstone, Commentaries 45.) He denounced the "making of laws *ex post facto*" because "it is impossible that the party could foresee that an action[,] innocent when it was done, should be afterwards coverted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust." (*Id.* at p. 46.)

Strictly speaking, the category of *ex post facto* laws of which Blackstone spoke is now confined to the criminal. (*Calder v. Bull* (1798) 3 U.S. 386, 390; *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 180; *Campbell v. Department of Motor Vehicles* (1984) 155 Cal.App.3d 716, 718.) Still, the disinclination to penalize action "innocent when it was done" has reached the civil sector and is not limited to legislation. At the close of the last century our Supreme Court stated: "'It would be as mischievous as an *ex post facto* law to permit a subsequent [judicial] decision to overturn the fair compromises and contracts of individuals made under a different and correct view of the law. . . . The agreement was in exact accordance with the general understanding of the law at the time it was made.

Two years afterward the court of appeals, in another case, gave a different construction. The community would be in a miserable condition if at every change of opinion upon questions of law all their previous contracts and settlements were to be overturned. Men could never know the end of their controversies were such a rule to prevail.' . . . 'A subsequent decision of a higher court, in a different case, giving a different exposition to a point of law from the one declared and known, when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. . . . There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one case on a point of law to open and annul everything that has been done in other cases of a like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of mankind, no such pernicious precedent is to be found. *The case is, therefore, to be decided according to the existing state of things when the settlement in question took place.*' " (*Cooley v. County of Calaveras* (1898) 121 Cal. 482, 486 [original emphasis]; see 1 Kent, Commentaries on American Law (14th ed. 1896) 476.) There are comparable statements of a more recent vintage. (See *California Assn. of Highway Patrolmen v. Department of Personnel Admin.* (1986) 185 Cal.App.3d 352, 364-365; *Mitchell v. National Auto. & Casualty Ins. Co.* (1974) 38 Cal.App.3d 599, 604-605; *Bank of America v. Department of Mental Hygiene* (1966) 246 Cal.App.2d 578, 586-587.)

The motivation for such expressions is not limited to courts. The Legislature's enactment of Business and Pro-

fessions Code section 21148 evidences its interest and concern with the specific problem of franchisor power to prevent assignment. The substance of that statute aligns the Legislature with the judicial position expressed in *Cohen*, *Schweiso*, and *Kendall*. Nevertheless, the Legislature took pains to establish that section 21148 "shall not apply to a franchise entered into before the effective date of this act." (See fn. 2, *ante.*) This decision represents the Legislature's considered assessment that the benefits of change do not outweigh the necessity of desirability of respecting existing contracts and leaving them unaffected by the statute. That assessment commands our attention, even if it involves staying the impact of judicial decisions, because "the Legislature is no less competent than the court to evaluate the hardships involved and decide whether *considerations of fairness and public policy* warrant the granting of relief." (*Forster Shipbldg. Co. v. County of L.A.* (1960) 54 Cal.2d 450, 459 [emphasis added]; accord *County of Los Angeles v. Superior Court* (1965) 62 Cal.2d 839, 845; *Schettler v. County of Santa Clara* (1977) 74 Cal.App.3d 990, 998; *Atlantic Richfield Co. v. County of Los Angeles* (1977) 68 Cal.App.3d 105, 115.)

There is much to commend in the balance struck by the Legislature's conscious decision to impose new standards but not make them retroactive. It recognizes that fairness must be done to both parties to a franchise arrangement. The franchisee is afforded an increased measure of security by the limitations imposed upon a franchisor's previously unrestricted common law and contractual right to refuse assent to an assignment. The franchisor is given clear notice concerning the precise nature of those limita-

tions (which appear to correspond to the judicially-formulated standard of "commercial reasonableness"). The public policy behind Business and Professions Code section 21148 is clear and of sufficient gravity to receive legislative recognition. Nevertheless, the advantages were not deemed of sufficient import to warrant the disturbance of existing franchise relationships. This compromise was made within the context of vested contractual rights involving the security of title to real property, a situation where the need for stability is at a premium. (See *Wellenkamp v. Bank of America, supra*, 21 Cal.3d 943 at p. 954.) The Legislature deemed these considerations of such magnitude to warrant deferring the implementation of the public policy goals.

Our weighing of the relevant considerations comes down to this. At all relevant times, the prevailing rule of law was that a lessor could withhold assent to a proposed assignment for any reason whatsoever. Mobil displayed considerable and justifiable reliance on that rule, which did not alter until two years later. The strength and extent of that reliance is only partially offset by Mobil's inability to foresee the nonjudicial portents of a change in the rule. By contrast, there is no evidence that plaintiff had any inkling of a *judicial* change of the rule. He was aware of the *legislative* modification of the rule embodied in Business and Professions Code section 21148. That modification, however, was accompanied by a solemn determination by the Legislature that it should *not* be retroactive. Public policy supporting the change will not be advanced by applying the change to completed contractual arrangements involving the stability of real

property titles. As regards the fairness factor, we perceive no satisfying basis for making plaintiff the windfall beneficiary of a change he did not forsee or help bring about. Conversely, it is patently unfair to penalize Mobil for its nonconformity with standards which took effect only after it conscientiously determined the state of the law and relied upon it in reasonable good faith. Upon full reflection of the problem, we believe that it is appropriate to follow the Legislature's lead and adhere to its decision respecting the relative hardships and advantages of implementing the new standard. The salient equities and considerations of vested right support Mobil's claim that its conduct is to be judged in accordance with the rule of *Richard v. Degen & Brody, Inc.* (See *Peterson v. Superior Court, supra*, 31 Cal.3d 147 at pp. 152-153; *County of Los Angeles v. Faus, supra*, 48 Cal.2d 672 at pp. 680-681; *Cooley v. County of Calaveras, supra*, 121 Cal. 482 at p. 486.) Although we are not unmindful that it entails the temporary preservation and application of a discredited principle of law (see *Forster Shipbldg. Co. v. County of L. A., supra*, 54 Cal.2d 450 at p. 459; *Kawasaki Motors Corp. v. County of Orange* (1983) 146 Cal.App.3d 780, 783; *Schettler v. County of Santa Clara, supra*, 74 Cal.App.3d 990 at p. 997), we are compelled to conclude that the trial court erred in ruling that defendants' actions were to be evaluated by the *Cohen-Schweiso-Kendall* standards governing the exercise of a lessor's contractual right to refuse consent to an assignment of the contract.

The effects of this conclusion are manifold. Mobil's conduct with respect to plaintiff's proposed assignees were central to the causes of action submitted to the jury

and covered by their verdict. Mobil's refusal to consent to assignment was the heart of plaintiff's breach of contract cause of action. The same conduct by Mobil was, to a lesser but still prominent extent, involved in the tort claims for intentional infliction of emotional distress and interference with prospective economic advantage, which formed the basis for the awards of punitive damages. The refusal to consent to an assignment also figured in plaintiff's cause of action based upon the PMPA, which was subsequently disallowed by the trial court. The error thus pervades the entirety of the verdict for compensatory and punitive damages, with the result that the ensuing judgment must be reversed.

II*

Defendants raise a number of evidentiary contentions which we would ordinarily address to provide guidance in the event of a retrial. In this instance, however, the rulings defendants challenge involved the trial court's discretion vested in it by Evidence Code section 352. Our holding in part I will obviously require a fundamental reassessment by the parties concerning their respective positions when matters are returned to the trial court. The court's prior rulings are consequently likely to have little meaning in light of the parties' obsolete strategies. Rulings made pursuant to section 352 must be examined in light of the context in which they are made; they do not lend themselves to abstract evaluation. For this reason we deem it prudent not to reach the merits of the contentions defendants now advance.

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* See footnote, *ante*, page 1.

III*

Defendants' remaining contentions pertain to alleged error concerning: (1) an instruction affecting the causes of action for breach of contract and interference with prospective economic advantage; and (2) the legal and evidentiary sufficiency of the damages awards. These contentions have become moot in light of our decision to reverse the judgment for the reasons discussed in part I. We consequently do not reach their merits.

IV*

Plaintiff opens the barrage of contentions pressed on his appeal by arguing that the trial court erred in disallowing prejudgment interest and recovery for loss of plaintiff's home. The first of these claims has been made academic by our decision to reverse the judgment. An actual judgment awarding damages is the factual predicate for operation of Civil Code section 3291. In the absence of a judgment, which would establish whether recovery is in fact in excess of the compromise offer made pursuant to Code of Civil Procedure section 998, the question of prejudgment interest remains purely theoretical.

Recovery for intentional interference with prospective economic advantage is limited to "business losses" such as anticipated profits or a diminution in the value of the business. (See *Buxbom v. Smith* (1944) 23 Cal.2d 535, 541; *Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 688-689; *Bert G. Gianelli Distributing Co. v. Beck &*

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* See footnote, *ante*, page 1.

Co. (1985) 172 Cal.App.3d 1020, 1053; *Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 407.) Because plaintiff's house clearly does not qualify as a direct "business loss" within this definition, the trial court properly refused to allow plaintiff to recover for it.

V*

As previously mentioned, the trial court ruled that plaintiff's cause of action based upon the PMPA (which among other things specifies procedures for franchise termination) could not be maintained because it was within the exclusive jurisdiction of the federal courts and was barred by the statute of limitations. Plaintiff's contentions to the contrary do not convince us to find reversible error.

Granted, there is authority stemming from a brief discussion in *Ted's Tire Service Inc. v. Chevron U. S. A. Inc.* (D. Conn. 1979) 470 F.Supp. 163, 165, which supports plaintiff's claim that the PMPA grants concurrent jurisdiction to both state and federal courts. The extent to which this view has prevailed is attributable to uncritical acceptance (see *Sun Refining & Marketing Co., Inc. v. D'Arpino* (S.D.N.Y. 1986) 112 F.R.D. 668, 670) or its adoption by several California courts in passing dicta. (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 913; *California Arco Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 364.) The one exception is *Johnson v. Mobil Oil Corp.* (Pa.Super. 1987) 528 A.2d 155, 163-164, where the question is examined in some depth.

A contrary conclusion was reached by a federal court sitting in California. In *Rustom v. Atlantic Richfield Co.*

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* See footnote, *ante*, page 1.

(C.D.Cal. 1985) 618 F.Supp. 210, the court criticized the "limited" analysis employed in *Ted's Tire Service Inc.* and found it unpersuasive in light of subsequent decisions by the United States Supreme Court and the Ninth Circuit. Following a lengthy and detailed examination of the issue, the court concluded: "Given the references in the legislative history here only to the maintenance of actions in federal court, the provision in the Act for the application of the Federal Rules of Civil Procedure for the award of damages and the further provision of a standard for the issuance of a preliminary injunction as applied by the federal courts, I hold that Congress intended to vest the federal courts with exclusive jurisdiction over actions brought under the PMPA. It follows that the [California] state court from which this action was removed lacked subject matter jurisdiction over the action." (*Rustom v. Atlantic Richfield Co., supra*, 618 F. Supp. 210 at p. 214.)

The treatment given the problem of jurisdiction in *Rustom* is unquestionably more thorough and lucid than the cursory examination found in *Ted's Tire Service Inc.* Its intrinsic authority is enhanced by its source—a federal court sitting in California which may therefore be presumed to have a heightened sensitivity to, and familiarity with, California concerns. (Cf. *Bishop v. Wood* (1976) 426 U.S. 341, 345-347 [text and fn. 10]; *Tardan v. Chevron Oil Company* (5th Cir. 1972) 463 F.2d 651, 652; Wright, The Law of Federal Courts (4th ed. 1983) § 58, p. 375.) Having carefully inspected the reasoning of *Rustom*, we agree with it as stating the governing rule of decision. There is consequently no basis for upsetting the trial court's submission to it. In light of this conclusion there

is no need to determine the soundness of the alternative grounds for the ruling.

Our conclusion on this point also moots plaintiff's claim that "[i]n the event of remand for determination of punitive damages" for violation of the PMPA he should be permitted to examine a Mobil employee who made a public statement following the verdict which plaintiff claims demonstrates Mobil's continuing malice.

VI*

On his cross-appeal plaintiff challenges the trial court's sustaining defendants' demurrer to his cause of action purportedly based upon the violation of Business and Professions Code section 21148. The Legislature made it perfectly clear that that statute "shall not apply to a franchise entered into before the effective date of this act." (See fn. 2, *ante*.) According to plaintiff, what he was trying to transfer was the franchise whose term began on January 1, 1981, the effective date of the statute; the fact that he had signed the two documents constituting the franchise agreement in December of 1980 is irrelevant and does not qualify it as "a franchise entered into before the effective date" of section 21148. This argument does credit to the ingenuity of plaintiff's counsel, but it would not reflect credit on this court were it to be accepted. Plaintiff's argument that when a party executes a franchise agreement he has not "entered into" a franchise is artificial and contrary to common sense and recognized authority. (See Code Civ. Proc., § 395, subd.

* See footnote, *ante*, page 1.

(a); *Richardson v. Rose* (1961) 197 Cal.App.2d 318, 321-322; *Di Giorgio Fruit Corp. v. Zachary* (1943) 60 Cal.App. 2d 560, 562.) It also flies in the face of the transparent intent of the Legislature. The Legislature's limitation is expressed with absolute clarity and must be respected. (See *Young v. Haines* (1986) 41 Cal.3d 883, 897; *Emberton v. County of San Diego* (1986) 186 Cal.App.3d 268, 271; *Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 361; *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 886-887.) The trial court did so and so must we.

VII*

Plaintiff next contends in effect that the trial court erred in granting defendants' motion for summary judgment on his cause of action for tortious breach of the implied covenants of good faith and fair dealing. This cause of action was largely a recasting of plaintiff's cause of action for the breach of contract alleged to have been the wrongful exercise of Mobil's power to refuse its assent to a transfer of plaintiff's franchise. The trial court correctly ruled that tort damages were not available in this ordinary commercial dispute not involving the denial of a valid contract. (See *Multiplex Ins. Agency, Inc. v. California Life Ins. Co.* (1987) 189 Cal.App.3d 925, 932-938; *Bert G. Gianelli Distributing Co. v. Beck & Co., supra,* 172 Cal.App.3d 1020 at pp. 1035-1036; *Quigley v. Pet, Inc.* (1984) 162 Cal.App.3d 877, 892-893; *Wallis v. Superior Court* (1984) 160 Cal.App.3d 1109, 1116-1119.)

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* See footnote, *ante,* page 1.

VIII*

In the same vein, plaintiff claims that the trial court erred in granting defendants summary judgment on his cause of action for defendants' negligent interference with his prospective economic advantage, i.e., between plaintiff and his proposed assignees. This contention must fail in light of our holding in part I that Mobil had an unlimited right to refuse consent to any and all of the proposed assignments.

IX*

Plaintiff's final contention pertains to the measure of damages allowable for the purported breach of contract. This, too, is moot in light of the preceding discussion pertaining to that cause of action.

Those portions of the judgment providing that plaintiff recover damages, costs and interest from defendants Mobil Oil Corporation and James Edwards are reversed. The judgment is affirmed in all other respects. The orders made after judgment are also affirmed. The parties shall bear their respective costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

Poche, J.

WE CONCUR:

Anderson, P.J.

Sabraw, J.

Kreisher v. Mobil Oil Corp. et al.
A036017

* See footnote, *ante*, page 1.

APPENDIX B

COURT OF APPEAL OF THE STATE
OF CALIFORNIA

IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 4

KREISHER, DENZIL G.

vs.

MOBIL OIL CORPORATION, ET AL.
A036017 Old No. A033839
Marin County No. 108816

BY THE COURT:

The petition for rehearing and the request to publish are denied.

Dated: Mar 3 1988

ANDERSON, J. P.J.

APPENDIX C

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, No. A036017

S004852

(Filed May 5, 1988)

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

KREISHER

v.

MOBIL OIL CORP. et al.

Petition for review of Kriesher DENIED.

The request for an order directing further publication of the opinion in the above-entitled cause is denied.

LUCAS
Chief Justice

APPENDIX D

PETROLEUM MARKETING PRACTICES ACT, 15 U.S.C. §§ 2801-2806

SUBCHAPTER I—FRANCHISE PROTECTION

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor.

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailor or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursu-

ant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under said franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the con-

clusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a rea-

sonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agree-

ment, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operations by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

Definition

(c) As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

(d) In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship

(without regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

Nonapplicability of statutory nonrenewal provisions

(a) The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

Definitions

(b) For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

Nonrenewal upon meeting statutory notification requirements

(c) If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)

(E)(ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date of which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

Manner and form of notification

(c) Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

Preparation, publication, etc., of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Fed-

eral Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b)(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or

2803 of this title, including declaratory judgment, mandatory or prohibitive injunction relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

Burden of proof; burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable addi-

tions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

§ 2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.